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KGF Development LLC v. City of Ketchum Appellant's Reply Brief Dckt. 36162

IN THE SUPREME COURT OF THE STATE OF IDAHO

KGF DEVELOPMENT, LLC, Plaintiff/Appellant, vs. CITY OF KETCHUM, a Municipal Corporation of the State of Idaho, Defendant/Respondent, 260 FIRST, LLC, an Idaho Limited Liability Company, Intervenor/Respondent.	Supreme Court No. 36162-2009

APPELLANT'S REBUTTAL BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF BLAINE

THE HONORABLE ROBERT J. ELGEE, DISTRICT JUDGE

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III. INTRODUCTION

Preliminarily, to the extent not mentioned in this Reply Brief, KGF reasserts each and every argument set forth in its Opening Brief as is fully set forth and relies on such arguments in this Reply Brief. In addition, KGF submits the following additional reply to the response briefs submitted by 260 First and the City of Ketchum.

IV. FACTS

A. CLARIFICATION OF FACTS AS PRESENTED BY 260 FIRST.

In its Response Brief, 260 First makes several misleading statements about its claimed "reliance" on the adoption of the transfer of Development Right ("TDR") Ordinance. KGF is concerned that by making such statements, 260 First is implicitly raising an estoppel argument without identifying it as an issue. For this reason, KGF wants to make clear to the Court that estoppel is not at issue in this case for the following reasons.

From well before the adoption of very first TDR Ordinance (Ordinance 1005) in March 2007, up to the present, KGF has consistently asserted its challenge to the TDR Ordinance. (See R., p. 211, Exhibit 3 – *Cady Depo.*, Exhibit 1 to the Deposition, p. 38-39 of the Transcript of the February 22, 2007 City Council meeting). KGF timely appealed the adoption of Ordinance 1005, the adoption of Ordinance 1034, and the issuance of a foundation permit to 260 First. (R., p. 211, Exhibit 3, *Cady Depo.*, Exhibits 1 and 2 to Deposition). 260 First has been an active participant in every appeal.

Further, when 260 First applied for a "foundation" permit under the defective Ordinance 1005 and KGF appealed it, 260 First cleverly defended a request for a stay of the permit by KGF by insisting that the permit was only for a "foundation," so that even

if the ordinance were declared void, 260 First could build a three-story building on that foundation. Based on that, the trial court in that case did not grant the stay of the foundation permit. Blaine County Case No. CV-08-167.

Therefore, given 260 First's knowledge at all times of KGF's challenge and the potential invalidity of the TDR ordinance, the Court should not give any weight to any "reliance" by 260 First. In spite of the challenge to the validity of Ordinance 1005 and Ordinance 1034 and the building permit, 260 First has proceeded aggressively, undeterred, with plans to build a four-story building. Such forward progress shows 260 First's intent to set up a situation where it may claim a "vested" interest and thereby build its four-story building no matter whether the TDR ordinance is declared void or not. There is no dispute that 260 First is no innocent, "bona fide" builder, who undertook its plans and built its foundation without knowledge of the challenges to the ordinance.

Continued construction in the face of this kind of notice has expressly been held by the Idaho Supreme Court *not* to constitute good faith reliance, a necessary showing for estoppel to apply. *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986). 260 First cannot claim it has been surprised or prejudiced in any way as it has had notice of the possibility of Ordinance 1034 being ruled void.

Also, 260 First does not have any TDR with which to build to a four-story building and, two years after submitting its plans for design review, can only state it "had been in negotiations" for a TDR, making any alleged reliance damage completely speculative. (*Intervenor/Respondent's Opposition Brief*, p. 3). A declaration that the TDR Ordinance is void will only mean that 260 First is limited to a three-story building, exactly what was available to it when it purchased the property.

B. IMPORTANT UNDISPUTED FACTS

When Copper Ridge was built, the highest a building could have been built on the Copper Ridge property of the requirements of the Ketchum Municipal Code ("KMC") was 38 feet, a three-story building. (R., p. 46, *Affidavit of Barry Luboviski*, ¶4 and 5.) At the time, there were no buildings in Ketchum that were higher than 38 feet and the City had never permitted a building over 38 feet, and the City had never waived its limitations on building height. (*Id.*) Instead, there had always been great resistance by the public to higher buildings in Ketchum to preserve its small town feel. (*Id;* See also R., p. 211, Exhibit 3 – *Cady Depo.*, Exhibit 1 to Deposition, Minutes of February 20, 2007 City Council Meeting, p. 10).

In 2006, the "Downtown Ketchum Master Plan" recommended that the Historic Preservation Commission be engaged to advise the City of Ketchum on preserving historic buildings through the use of transfer of development rights and that the city planner take the lead on that effort. (R., p. 211, Exhibit 4 - *Robrahn Depo.*, p. 17, l. 21 – p. 20, l. 4; see also Exhibit 3 - *Cady Depo.*, Exhibit 3 to Deposition, *Affidavit of Beth Robrahn,* Exhibit C, p. 57.)

The purpose for drafting the TDR Ordinance was for the preservation of historic properties in the City of Ketchum. (*Id.*, at ¶ 8-12; See also Exhibit 4 - *Robrahn Depo.*, Tr. p. 33, l. 6-21; p. 29, l. 25 - p. 30, l. 9.) The TDR Ordinance was not drafted to protect open space, wildlife or critical areas. (R., p. 211, Exhibit 3 - *Affidavit of Beth Robrahn,* ¶ 8-12, Tr. p. 33, l. 6 – p. 37, l. 15.)

"The thrust of the Commission's recommendation was to allow a historic building property owner to sell their development rights as an incentive for preserving their

historic building." (R., p. 211, Exhibit 3 – *Cady Depo.,* Exhibit 1 to Deposition, Record in Blaine County Case No. CV-07-250, Council Workshop, November 15, 2006, Memorandum from Beth Robrahn, Senior Planner to Mayor and City Council, dated November 15, 2006). "It is the Planning and Zoning Commission's recommendation to prioritize the preservation of historic buildings." (*Id.,* at Council Meeting, January 16, 2007, Staff Report, I. Background, Paragraph 3).

The TDR Ordinance establishes a procedure for transferring development rights form one property to another and designated 22 Sending Sites that allow that property owner to sever the development rights from the property and transfer them to any of 102 Receiving Sites. (R., p. 211, Exhibit 3 - *Affidavit of Beth Robrahn,* ¶14-18, and ¶25, Exhibit L; Exhibit 4 - *Robrahn Depo.*, Tr. p. 41, l. 13-15; p. 51, l. 6-9.)

Only four (4) of the twenty-two (22) designated Sending Sites are listed or meet the criteria for listing on the National Register of Historic Places. (*Id.,* at p. 39, l. 17-19; p. 43, l. 44 – p. 44, l. 22). No other Sending Sites meet the criteria. (*Id.*)

The owner of a Sending Site can sell more than double the development rights the owner would otherwise be entitled to develop. (R., p. 211, Exhibit 3 - *Affidavit of Beth Robrahn*, Exhibit L).

The Sending and Receiving sites are scattered throughout the community core district. (R., p. 211, *Affidavit of Fritz X. Haemmerle*, Defendant City of Ketchum's Responses to Plaintiff's Requests for Production and Requests for Admissions, Response to Request for Admission No. 1; *see also*, Ordinance 1034, Figure 1). There is no restriction on the sale of development rights to a Receiving Site located next door, so that

a four-story building may be located right next to a historic property. (*Id.*; *see also* R., p. 211, Exhibit 4 - *Robrahn Depo.*, Tr. p. 36, l. 25 – p. 37, l. 15; p. 40, l. 8 – 22).

Vacant properties cannot qualify as Sending Sites. (*Id.*, at p. 35, l. 2-7).

V. REPLY ARGUMENT

A. UNDER ANY THEORY ADVANCED BY THE CITY OR 260 FIRST, ORDINANCE 1034 IS VOID.

The central issue in this case is this: given the express provisions of I.C. §§ 67-6515A and 67-4601 *et seq.*, whether the City of Ketchum may, via Ordinance 1034, adopt a scheme for the transfer of development rights from historical properties different from that set forth in the statutes? The City argues that it can enact any TDR Ordinance it so desires under its police powers even without the legislative grants of authority in Section 67-6515A and 67-4601 *et. seq.* Putting aside for the that the express language of Ordinance 1034, which tracks Section 67-6515A (albeit defectively), the City's after-the-fact argument that it could have enacted any TDR ordinance it desired is without merit.

The identical argument was rejected in a recent case from the State of New Jersey. In *Builders League v. Franklin*, 928 A.2d 88 (N.J.Super.A.D. 2007), the specific issue was whether the municipality could devise a transfer of development rights program other than as authorized by the state statute. The New Jersey Supreme Court ruled that the municipality could not. Like the City of Ketchum in this case, the municipality in *Builders League* adopted a TDR ordinance that did not quite fit the parameters of the state statute. When challenged, the municipality argued that it could "channel development and preserve critical habitat through a program that has some characteristics of a TDR program without the complexity of the program outlined in the State Act." *Id.* at 928 A.2d 94.

This position was flatly rejected by both the lower court and the appeals court. The Superior Court ruled that "the Township's contention that it may adopt a streamlined TDR program is also without merit." *Id.* at 928 A.2d 95. Where a statute "establishes criteria for a specific situation or confers authority on a specific entity, a municipality is not free to chart its own course." *Id.*

In so ruling, the New Jersey Court pronounced the same position being advanced by KGF in this case. That is, given the specific language relating to TDRs in Section 67-6515A and to historic properties in Section 67-4601 *et. seq.*, the City of Ketchum may not "chart its own course" and adopt its own variation of a TDR program involving historic properties.

This position is also supported by well-established rules of statutory construction. "Courts must construe a statute under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *City of Sandpoint v. Sandpoint Ind. Hwy*, 126 Idaho 145, 150, 879 P.2d 1078, 1082 (1994). Since the legislature adopted Sections 67-6515A and 67-4619 to expressly authorize TDR ordinances, it must be assumed that the Legislature believed its actions were necessary to empower cities to enact TDR ordinances and that the Legislature desired to set the procedures by which such ordinances would operate.

It is also well-established that when the state legislature has enacted a specific statutes addressing an issue, that statute controls over more general statutes. *City of Sandpoint v. Sandpoint Ind. Hwy., supra* at 26 Idaho 149. "A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general." *Tuttle v. Wayment Farms, Inc.*, 131 Idaho 105, 952,

P.2d 1241 (1998); *City of Sandpoint v. Sandpoint Independent Highway Dist.*, *supra*; *Hansen v. State*, 138 Idaho 865, 868, 71 P.3d 464 (Ct.App. 2003). The more general statute should not be interpreted as encompassing an area already covered by one which is more specific. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

The City has argued that I.C. § 67-6511 of the Local Land Use Planning Act ("LLUPA") generally empowers cities to adopt zoning ordinances including TDRs.

> Each governing board shall, by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan.
>
> Within a zoning district, the governing board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures. All standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one (1) district may differ from those in another district.

I.C. § 67-6511.

This provision authorizes cities to establish standards regulating height of buildings, density, floor area ratios, and number of stories, subject to the requirement that such standards are uniform throughout a district.

However, more specifically, Section 67-6515A addresses the transfer of development rights. In enacting Section 67-6515A, the Legislature is presumed to have been aware of the general authority granted in Section 67-6511. Accordingly, Section 67-6515A, being more specific to TDR ordinances, is the controlling statute.

The City and 260 First also argue that Ordinance 1034 fits within the language of Section 67-6515A because Ordinance 1034 was for the purpose of protecting "open space." This argument is a *post facto* justifactin for the Ordinance. Both the Planning and Zoning Commission and the City Council acknowledged that the TDR Ordinance was to preserve historic properties. The city planner who drafted the original ordinance and ushered it through the enactment process admitted, and the record is replete with references to the fact that the TDR Ordinance was enacted to protect historic properties and not open space, wildlife habitat and critical areas, or for enhancing and maintaining the rural character of lands contiguous to agricultural lands. (*Affidavit of Beth Robrahn,* ¶ 8-12, Robrahn Depo., Tr. p. 33, l. 6 - p. 37, l. 15.)

In this case, the Record establishes that what the City was attempting to protect by passage of the TDR Ordinance was historic buildings in downtown Ketchum. "The thrust of the Commission's recommendation was to allow a historic building property owner to sell their development rights as an incentive for preserving their historic building." (R., p. 211, Exhibit 3 - *Cady Depo.,* Exhibit 1 to Deposition, Record in Blaine County Case No. CV07-250, Council Workshop, November 15, 2006, Memorandum from Beth Robrahn, Senior Planner to Mayor and City Council, dated November 15, 2006). "It is the Planning and Zoning Commission's recommendation to prioritize the preservation of historic buildings." (*Id.,* at Council Meeting, January 16, 2007, Staff Report, I. Background, Paragraph 3).

Based on the express testimony of Beth Robrahn, Ordinance 1034 was not adopted in conformance with Section 67-6515A as the Ordinance does not protect open space, wildlife habitat and critical areas, or enhance and maintain the rural character of

lands with contiguity to agricultural lands suitable for long-range farming and ranching operations. It was adopted to protect historic properties.

Even if the TDR Ordinance was drafted to protect open spaces, the TDR Ordinance accomplishes just the opposite. By prohibiting vacant properties from engaging in the TDR program, by permitting buildings to go to four stories where they could not before, by permitting those four-story buildings to be right next to heritage sites, and by granting double density increases otherwise not permitted, Ordinance 1034 will actually reduce open space in the City.

The City also tries to squeeze Ordinance 1034 into the confines of Section 67-6515A by claiming that the Sending Sites qualify as "critical areas." However, given the fact that "critical areas" and "wildlife habitat" are joined together in the same clause, they must be interpreted in *pari materia.* Statutes must not be interpreted in isolation but rather "in pari materia" if they relate to the same subject. *Gooding County v. Wybenga,* 137 Idaho, 201, 204, 46 P.3d 18, 21 (2002). Critical areas must be interpreted in conjunction with the word wildlife and means areas critical to wildlife.

Failing to fit within the express terms of Section 67-6515A, the City and 260 First then argue that the preservation of "open space, protecting wildlife habitat and critical areas, and enhancing and maintaining the rural character of lands with contiguity to agricultural lands" is not an exhaustive list of permissible goals, and that protecting historic properties falls within Section 67-6515A.[1] This argument completely ignores the

[1] Without citation to any authority or facts in the record whatsoever, 260 First makes the completely unsubstantiated argument that cities do not have open space, wildlife or critical areas, or agricultural lands. First, KGF does not take issue with the City's ability to protect open space and that open space certainly includes parks. Second, open space, wildlife and critical areas do exist in the Ketchum city limits and are protected under its zoning classifications (Agricultural and Forestry District – AF, Ketchum Municipal Code (KMC), Chapter 17.84) and its design

rule that the "*maxim expression unis est exclusion alterius*", that is "expression of one thing in a statute excludes others not expressed." *Cox v. Mountain Vista, Inc.*, 102 Idaho 714, 772, 639 P.2d 12 (1981); *Wright v. Brady*, 126 Idaho 671, 674, 889 P.2d 105, 108 (Ct.App. 1995). Where a statute specifies certain things, designation of the specific excludes other things not mentioned. *Local 1494, ETC. v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1358 (1978); *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18 (1987).

The express language of Section 67-6515A permits cities and counties to adopt TDR ordinances to "fulfill the goals of the city or county to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations." I.C. § 67-6515A(1)(a). The preservation of "historic properties" is not identified as a permissible goal under Section 67-6515A. Therefore, according to rules of statutory construction, must be interpreted as being intentionally excluded. Also, given the maxim that the Legislature must have known of the existence of the Historic Preservation Act at the time it adopted Section 67-6515A, it makes perfect sense that the Legislature would *not* have included the preservation of historic properties as one of the purposes of Section 67-6515A.

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review, subdivision, and planned unit development standards. (See e.g. KMC §§16.04.110.B.10. and 19.; KMO § 17.96.040.B.10.) Finally, Trail Creek, the Big Wood River and Warm Springs Creek all are areas that would be considered critical areas with wildlife habitat and they all run right through the City of Ketchum. Knob Hill, Reinheimer Ranch, and the former Warm Springs Ranch property are open space areas in Ketchum that are deserving of protection. In short, 260 First's argument that no properties exist in cities that fall within the protection outlined in I.C. 67-6515A is meritless.

As for the use of TDRs to protect historic properties, I.C. § 67-4601 of the Historic Preservation Act is the general statute authorizing cities to enact ordinances to protect historic properties. It provides as follows:

> Whereas the legislature of this state has determined that the historical, archeological, architectural and cultural heritage of the state is among the most important environmental assets of the state and furthermore that the rapid social and economic development of contemporary society threatens to destroy the remaining vestiges of this heritage, it is hereby declared to be the public policy and in the public interest of this state to engage in a comprehensive program of historic preservation, undertaken at all levels of the government of this state and its political subdivisions, to promote the use and conservation of such property for the education, inspiration, pleasure and enrichment of the citizens of this state. It is hereby declared to be the purpose of this act to authorize the local governing bodies of this state to engage in a comprehensive program of historic preservation.

The Act then goes on to set forth in detail the various ways to protect such properties, including by way of a historic district, by way of easements, and by designation of historic properties. Specifically, Section 67-4619 authorizes cities to establish procedures for owners of "designated historic properties" to transfer development rights. Section 67-4614 also sets forth the procedure by which properties become "designated historic properties" and limits them to those that meet the criteria for listing on the National Register of Historic Places. The specific reference to "designated historic properties" in Sections 67-4619 and 67-4614, entitled "Designation as Historic Property," must be interpreted as intentionally excluding undesignated historic properties from the transfer of development rights.[2]

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[2] 260 First makes the argument for the first time that the Court should ignore the wording "designated historic properties" in Section 4619 and interpret it as meaning just "historic properties." This argument fails in the face of the plain language of the statute, which says "designated historic properties."

Ignoring the fact that the Section 67-4619 specifically relates to TDRs, both 260 First and the City argue that the language of Section 67-4612 allows for the adoption of a TDR ordinance. However, Section 67-4612 neither addresses TDRs nor the "designation of historic properties." As already addressed in KGF's Opening Brief, interpreting Section 67-4612 to authorize cities to permit the transfer of development rights to any non-listed property would elevate a vague and general statute over a more limited specific one, and vitiate every single rule of statutory construction. Since the legislature has adopted a statute, which specifically addresses the transfer of development rights, it controls over Section 67-4612.

As already pointed out in KGF's Opening Brief, a plain and reasonable reading of the Act and one which reconciles all of the various provisions shows that Section 67-4612 applies to further restrictions on the use and appearance of historic properties that are *similar to but not in conflict with* those conditions and restrictions already enumerated in the Act. The Act restricts what can and cannot be done to properties within a historic district and conditions such modifications on "certificates of appropriateness." I.C. § 67-4608. It also sets forth conditions on changes in use of such properties. I.C. § 67-4609.

Under the Act, TDRs are available for "designated historic properties" which are those that qualify for inclusion on the National Register of Historic Places – a clear, objective, and easily applied criterion. In this case, only four of the 22 sites in Ordinance 1034 meet those criteria.

In short, the specific provisions of Section 67-6515A control over the more general grant of authority in Section 67-6511, and the specific provisions of Section 67-4619 control over the more general grant of Section 67-4601. Since the legislature has

expressly stated one thing in these specific sections, it is deemed to have excluded another. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, (1987). Both sections 67-6515A and 67-4619 expressly authorize cities to utilize TDRs in limited circumstances. This express authorization should be construed to exclude cities from utilizing TDRs in other hybrid situations such as those in Ordinance 1034.

Otherwise, the state TDR provisions are rendered superfluous. "It is incumbent upon the court to give [a] statute an interpretation that will not deprive it of its potency." *Hecla Mining Co. v. Idaho State Tax Commission*, 108 Idaho 147, 151, 697 P.2d 1161, 1165 (1985). If, in fact, the City could adopt the TDR Ordinance under the alleged "broad" powers granted under the LLUPA or the Historic Preservation Act, then there would be no need whatsoever for Sections 67-6515A or 67-4619. The City's and 260 First's arguments render both of these statutes superfluous.

A municipality's power to zone is not unlimited; the power to zone derives from the police power of the state. *City of Lewiston v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984).

The principal is exemplified by the LLUPA, which provides both mandatory (I.C. § 67-6503) and exclusive (*Gumprecht v. City of Coeur d' Alene*, 104 Idaho 615, 661 P.2d 1214 (1983)) procedures for the implementation of planning and zoning." *Sprenger, Grubb & Assoc., Inc. v. Hailey,* 133 Idaho 320, 321, 986 P.2d 343, 344 (1999); *see also, Associated Taxpayers of Idaho v. Cenarrusa*, 111 Idaho 502, 725 P.2d 526 (1986).

This principal is also exemplified by the language of the Historic Preservation Act, which expressly states that by the Act the legislature "authorize[s] the local governing bodies of this state to engage in a comprehensive program of historic

preservation." At the passage of the Act, cities became "authorized" to engage in historic preservation in accordance with the provisions of the Act.

Had the Legislature intended cities to have all-inclusive TDR authority or to leave room for cities to enact TDR ordinances of every shape and size, it could easily have enacted statutes that said so. The Legislature could have enacted a TDR statute in the LLUPA that very simply said "cities are authorized to adopt ordinances for the transfer of development rights." This would be similar to the general statute that authorizes planned unit developments.

Similarly, the Legislature could also have easily authorized cities in Section 67-4619 to adopt ordinances for the transfer of development rights for "historic properties" with no reference to "designated historic properties." In fact, other sections of the Act do make reference to only "historic properties" rather than "designated" ones.

In contrast to broad language the Legislature could have easily used with respect to TDRs, Sections 67-6515A and 67-4619 specifically authorize TDRs for limited reasons, none of which apply here.

The City has admitted that the Sending Sites are neither agricultural in nature nor eligible for the national historic registry. The City has also admitted that only four of the 22 designated Sending Sites meet the criteria for listing on the National Register of Historic Places. Since the TDR Ordinance transfers development rights for purposes outside of those identified in Sections 67-6515A and 67-4619, the TDR Ordinance is null and void.

B. ORDINANCE 1034 VIOLATES UNIFORMITY REQUIREMENTS.

The City has distinguished *Moerder v. City of Moscow*, 78 Idaho 246, 300 P.2d 808 (1956) from this case, arguing that the ordinance in that case was fluid and changed "at the whim of individual builders." Yet, the same can be said of Ordinance 1034. The ability to go to four stories is dependant completely on the whim of a particular owner of a Sending Site. That owner may pick and choose to whom to sell development rights among any of the 100 plus Receiving Sites.

The *Moerder* court noted that

> The application and consequence of this ordinance is a gross discrimination, in that it does not bear alike on all persons living within the same territory. * * * it affects property differently on adjoining blocks, or within the same block or on opposite sides of the street. As Judge Linn of the Superior Court states: `* * * Consideration of the section will disclose that the line may be further back from the street line on one side of the street than on the other, and even on the same side of the street its distance from the street line may vary in different squares, its location depending wholly on how far back (if at all) a house or houses had already been built, and if but one house had been built, its line would seem to control all the other lot owners.

Further,

> Under the ordinance, setback lines could vary from one block to the next on the same street. The building line could be farther back on one side of the street than on the other, as in fact it was in the present case. The line could even vary from year to year in the same block as additional houses were constructed, if the ordinance were upheld.

Id. at 78 Idaho 250.

This is exactly the result of Ordinance 1034, except Ordinance 1034 is about height rather than setbacks. Depending upon the whim of a particular Sending Site owner, the Ordinance will affect property differently "on adjoining blocks or within the same block or on opposite sides of the street." A four-story building may end up next to

a one-story historic building, across the street from it or within the same block. Heights and density on any block depends wholly on whether, when, and to whom Sending Site owners desire to sell their development rights, essentially controlling the height limitations in the community core district.

Like the ordinance in *Moerder*, Ordinance 1034 applies on a first-come, first-serve basis to whoever has the means or wherewithal to develop first. This is especially true considering the limited number of Sending Sites so that only certain unknown property owners have the opportunity to participate in the TDR program. The fact that Receiving and Sending sites are scattered throughout the community core district and the fact that there is no limitation in Ordinance 1034 as to how many sites may ultimately be permitted as Sending or Receiving sites even if a property owner were to request to be so designated, further increases the unpredictability and lack of uniformity of the application of the ordinance. The result is that four-story buildings will pop up throughout the downtown core in a completely non-uniform manner.

Ordinance 1034 does not bear alike on all persons living within the same district and affects property differently on adjoining blocks, or within the same block or on opposite sides of the street depending upon one's ability to purchase development rights from an owner of a Sending Site. As such, even if the City could enact Ordinance 1034 outside of the parameters of Sections 67-6515A and 67-4619, Ordinance 1034 violates the uniformity requirement of Section 67-6511.

IV. CONCLUSION

There are two specific statutes regarding the transfer of development rights. Those are Section 67-6515A of the LLUPA, and Section 67-4619 of the Historic Preservation Act. KGF should prevail on this matter because:

1. Ordinance 1034 does not comply with Section 67-6515A because it was not enacted to protect or preserve agricultural land, wildlife, habitat, or open space. It was enacted to preserve historic buildings. The protection of historic properties is not within the permissible goals to support the enactment of a TDR Ordinance pursuant to this section.

2. Ordinance 1034 does not comply with Section 67-4619 because only four of the 22 designated Sending Sites in Ordinance 1034 meet the criteria for listing on the National Register of Historic Places. Given the specific criteria set forth in these statutes, the city is "not free to chart its own course." Since Ordinance 1034 does not comply with the provisions of either statute, it is void.

3. There is no independent authority for the City to adopt a TDR ordinance, not otherwise allowed under the specific and express provisions of the enabling state statutes. Moreover, even if the City did have some independent authority to adopt Ordinance 1034, the application of it is not uniform and is void.

For all of the reasons set forth in this Reply Brief and in KGF's Opening Brief, this Court should reverse the District Court and rule that Ordinance 1034 is void.

DATED this 30th day of July, 2009.

HAEMMERLE & HAEMMERLE, P.L.L.C.

By: _____
Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2009, I served a true and correct copy of the following documents, under the method indicated below:

Stephanie J. Bonney
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__X__ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

_____ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

_____ By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

Fritz X. Haemmerle